IN THE

Supreme Court of the United States

October Term, 1945.

No. .....

JOSEPH A. GORDON,

Petitioner,

vs.

PAUL A. PORTER, Price Administrator,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

Opinions Below.

The opinion of the Emergency Court of Appeals, filed February 19, 1946 [R. 95], is not yet reported. The judgment was entered the same day [R. 95]. The petition for rehearing of petitioner under Rule 27 of that court, filed March 7, 1946 [R. 100], by order enlarging the time so to do and including March 8, 1946 [R. 98] was denied by order filed March 26, 1946 [R. 110].

Jurisdiction.

The grounds upon which the jurisdiction of this Court is invoked are stated in the petition at page 2.

Statement of the Case.

The facts have been related in the petition.

The essential contentions of petitioner might be usefully presented here. It is violative of due process, he contends, for the Administrator to prescribe a formula for classification which depends on information beyond the petitioner's power to have accumulated or to obtain; to fail to require the source of that information to furnish the same to him before the classification becomes effective; to refuse to assist petitioner in the protest proceeding in his effort to establish that information and to make him dependent on "co-operation" of strangers to obtain the same.

The Emergency Court of Appeals erred, he further claims, in holding these contentions to involve interpretation or application and, hence, to be within the jurisdiction of the enforcement court or the proper subject of a declaratory judgment suit, thus excusing it from passing upon the validity of the procedure.

Specifications of Errors.

The Emergency Court of Appeals erred:

1. In holding that the questions here presented involved interpretation and application of the provisions of the regulations attacked and not validity or constitutionality;

2. In holding that the constitutional rights of petitioner could have been preserved by an action under the

Declaratory Judgment Act and that the same afforded him an efficient and complete remedy by which he could have fully protected himself;

3. In refusing to decide the question of whether the procedure prescribed by said provisions is fatally at fault;

4. In failing to hold that said provisions amount to deprivation of due process of law;

5. In divesting itself of jurisdiction to decide the validity of said provisions in favor of the District Court in an enforcement action or one under the Declaratory Judgment Act.

Summary of Argument.

1. The provisions of the regulations here attacked are a deprivation of due process of law.

2. Validity, not interpretation and application, of said provisions is the issue here.

3. The decision of the Emergency Court of Appeals in holding that interpretation and application of said provisions are all that is here involved, in refusing to decide the issue of validity, and in divesting itself of jurisdiction of the only issue here in favor of the enforcement court or in favor of a declaratory judgment action conflicts with decisions of this Court.

ARGUMENT.

The Provisions of the Regulations Here Attacked Are a Deprivation of Due Process of Law.

The provisions of the regulations here attacked required petitioner to determine his classification by using a factor which he had no opportunity or right to obtain. His annual sales for each of the years here involved were less than $250,000. On the basis of those amounts alone, petitioner would be a Group 2 store during all of the periods here mentioned. He was commanded, however, to add to his annual sales for each of these years another figure. This other figure was the amount of the annual sales of the other independent retailers under the same roof, complete strangers to him in a legal sense. He had no right to require them to keep records, to supervise the manner in which they were to be kept. He had no right to inspect them, nor did he have any opportunity, within reason, to keep such records of the sales of the other retailers for his own protection and upon his own responsibility.

The administrative scheme here considered provided no official method by which his classification could be determined. The Administrator confessed that his scheme lacked provision for official determination by a belated amendment issued September 28, 1945, in which he recognized, at last, that a retailer might be unable to secure the annual gross sales figures from other food retailers in the store and provided for the application by a food retailer, finding himself in such a situation, to apply to the nearest district office of the Administrator for a determination of his probable classification [R. 75]. While petitioner contends that this amendment does not cure the inherent lack of due process here present, some reason-

ableness, at least, was grafted into the scheme as of the date of said amendment. Obviously, the amendment cannot control the situation existing before that.

Furthermore, on the effective dates of the classification here attacked there was no requirement that the other retailers must furnish petitioner, and all others in his situation, with the required data from their records indispensably necessary for him to apply the classification formula.

The Administrator has defended against this attack upon the ephemeral ground that each retailer could depend upon the co-operation of the other retailers to obtain the necessary information. Certainly, so vague and nebulous a factor as co-operation cannot be a constitutional foundation for the scheme here defended by the Administrator.

The total effect of the scheme is to establish an unreasonable, arbitrary and capricious device. It was unreasonable for the Administrator to establish this scheme which made petitioner depend upon others to determine his standard of conduct. It was arbitrary for the Administrator to fail to provide a method of official determination. It was capricious of him to fail to require the other retailers to supply the needed information to petitioner in sufficient time for him to have properly determined his classification.

Being thus unreasonable, arbitrary and capricious, the scheme must fall by reason of the rule declared by this Court in *Nebbia v. New York,* 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469, as follows:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action,

do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

Hence, the only valid classification of petitioner's store would place him in a Group 2 store.

Validity, Not Interpretation and Application, of Said Provisions Is the Issue Here.

It is respectfully submitted that a mere reading of the provision here attacked establishes that neither interpretation nor application thereof is here involved.

It provides as follows:

"In determining annual gross sales, the total annual sales of all food departments in each retail store shall be included, whether or not all such departments are owned or operated by the same person. (For example, a retailer who operates a grocery department in a retail store must include the annual gross sales of the butcher, the fruit and vegetable dealer, the baker, the delicatessen, etc., even though such departments are owned or operated by other persons. Restaurants should not be included.)" [R. 61].

No canons of interpretation are required for this language. It is crystal clear in its literal meaning. The question is, however, is it valid? Petitioner contends that it is not for the reasons stated in the preceding point.

The Decision of the Emergency Court of Appeals in Holding That Interpretation and Application of Said Provision Are All That Is Here Involved in Reviewing to Decide the Issue of Validity, and in Divesting Itself of Jurisdiction of the Only Issue Here in Favor of the Enforcement Court or in Favor of a Declaratory Judgment Action, Conflicts With Decisions of This Court.

It has been firmly settled by this Court that the Emergency Court of Appeals, and this Court on review, has exclusive jurisdiction to determine the validity of regulations issued by the Administrator. (*Yakus v. United States,* 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834.)

If the Emergency Court of Appeals had recognized the true situation here as being one concerning validity, there is no doubt that it would have decided whether or not invalidity here existed. Its misconception of the issue here, resulting in its mistaking interpretation and application for validity, compelled it to reach the result it did. The result logically forced upon it by its misconception is to divest itself of jurisdiction to decide the issue here, in plain conflict with the noted decision of this Court.

It has wrongly surrendered this jurisdiction, first to the enforcement court under the misconception that the propriety of the classification as a matter of fact, and the interpretation of the regulations, are involved. Obviously, propriety of classification involves validity and in-

volves it exclusively in this action. This being so, the hands of any other court, except its own and this Court, are tied. Interpretation is not involved. A school boy could apply the prescribed formula if he had the required data. There is nothing for the enforcement court to interpret.

The Emergency Court of Appeals next surrenders its jurisdiction to a suit under the Declaratory Judgment Act. Plainly, this kind of action deals exclusively with matters of interpretation, but since no interpretation is here needed this surrender is wrong too.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted and that this Honorable Court should review the decision of the United States Emergency Court of Appeals and finally reverse it.

April, 1946.

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